83-437

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

INFANT DOE, PETITIONER,
V.
BLOOMINGTON HOSPITAL, JOHN AND MARY DOE,
AND MONROE COUNTY WELFARE DEPARTMENT,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF INDIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED*

1. Whether the death of Infant Doe renders this case moot even though (i) his death was the product of the lower court's order denying him surgery, food, and water and (ii) important constitutional questions that could recur yet continually evade review were raised prior to his death.

2. Whether Infant Doe was deprived of his life without due process of law in violation of the Fourteenth Amendment to the United States Constitution by the lower court's order that he be denied lifesaving surgery, food, and water.

3. Whether Infant Doe was denied procedural due process of law in violation of the Fourteenth Amendment to the United States Constitution when the lower court refused to appoint any guardian or

*The caption includes all parties to the proceeding.

counsel to represent his interests in court before it ordered that he be denied lifesaving surgery, food, and water.

4. Whether Infant Doe was denied equal protection of the law because of his handicap in violation of the Fourteenth Amendment to the United States Constitution when the lower court, on the ground that he might be mentally retarded, failed to apply for his protection the Indiana laws that assure the provision of lifesaving medical treatment, food, and water to otherwise similarly situated children.

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The petitioner Infant Doe respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Indiana Supreme Court entered in this proceeding on June 15, 1983.

OPINIONS BELOW

The opinions below are not reported, but are reproduced in the Appendix to this Petition.

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on June 15, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, §2, cl. 1.

U.S. Const. amend. XIV, §1.

Ind. Code Ann. §35-1-58.5-7(b) (Burns 1979 Repl.)

Ind. Code Ann. §35-42-1-1 (Burns 1971 Repl.)

Ind. Code Ann. §35-42-1-4 (Burns 1979 Repl.)

Ind. Code Ann. §35-42-1-5 (Burns 1982 Supp.)

Ind. Code Ann. §35-46-1-4 (Burns 1982 Supp.)

The text of these provisions is set

forth in the appendix to this petition.

STATEMENT OF THE CASE

On April 9, 1982, the petitioner, Infant Doe, was born at Bloomington Hospital at Bloomington, Indiana. He was born with a surgically correctable condition known as tracheoesophageal fistula that prevented him from orally ingesting food and water. App. 8. However, he could have received fluids and nourishment through intravenous feeding. R. 17.

Although Bloomington Hospital was not adequately equipped to perform the surgery necessary to enable Infant Doe to eat normally, nearby Riley Children's Hospital was equipped to handle this kind of surgery and employed an excellent pediatric surgeon. R. 36. This life-saving surgery, while difficult, has been

performed since 1941 and has a probable success rate of better than 90% if performed within the first 24 hours of birth. A. Bannon, M.D., The Case of the Bloomington Baby, Hum. Life Rev., Fall 1982 at 63, 67. If the surgery and nourishment were withheld, Infant Doe would certainly die. R. 41.

Despite the favorable success rate for surgery and the certainty of death without it, Dr. Walter L. Owens, the obstetrician who delivered Infant Doe, offered Mr. and Mrs. Doe the alternative of doing nothing to save the life of their child. Dr. Owens offered this as an alternative course of "treatment" because Infant Doe, in addition to having a tracheoesophageal fistula, also had Down's syndrome.

Feeling that a "minimally acceptable"

quality of life could not be obtained by an infant with Down's syndrome and that it would be in the best interests of the infant, their two other children at home, and their family entity as a whole if Infant Doe died, Mr. & Mrs. Doe decided that no corrective surgery should be performed and that no food or water should be administered. App. 10-11.

On April 10, 1982, a hearing concerning Infant Doe was held at Bloomington Hospital before Judge John Baker of the Monroe Circuit Court. The hearing was held at the request of Bloomington Hospital, which sought guidance from the court. App. 11.

Although no record of the April 10 hearing was made, Judge Baker's declaratory judgment of April 12 indicates that Dr. Owens testified at the hearing and

recommended that Infant Doe be kept at Bloomington Hospital and that he not be given life-saving surgery, food, or water.

In making his recommendation, Dr. Owens relied on the fact that although surgery could correct the tracheoesophageal fisutla and therefore allow the child to survive, it could not cure any mental retardation associated with Down's syndrome. Accordingly, Dr. Owens testified that even if corrective surgery were successful, Infant Doe could not attain a "minimally acceptable quality of life." App. 9.

Doctors James J. Laughlin, James J. Schaffer and Paul J. Wenzler also testified. They all recommended that Infant Doe be transfered immediately to Riley Children's Hospital for corrective

surgery.

In a hearing held April 13 in a companion case (see App. 14-17), brought by the Monroe County Prosecutor to secure treatment for Infant Doe but not directly involved in this appeal, the testimony was "substantially the same" as in the April 10 hearing of which no record exists. R. 64. In the April 13 hearing, in contrast to Dr. Owen's testimony, Dr. Laughlin, a pediatrician, testified that it was impossible to determine the severity of mental retardation in a newborn infant with Down's syndrome. He also testified that there is a broad range of I.Q.s for Down's syndrome children; they may range from severely retarded children with I.Q.s of 20 to 30 all the way into the normal intelligence range. R. 37-38. Dr. Owens did not

dispute Dr. Laughlin's testimony. Indeed, he agreed with it, stating, "As Dr. Laughlin indicated no one can be absolutely sure of the degree of retardation at the time of birth." R. 65. Despite this, Dr. Owens insisted that Infant Doe could not attain a "minimally acceptable" quality of life. R. 57.

> Both Dr. Schaeffer and Dr. Wenzler were prepared to tell the parents to give them only one option. To send the child to Riley Hospital for surgery. ... I insisted upon giving the parents a choice. I felt that this was not an adequate description of the situation. I insisted upon telling the parents, pointing out to the parents that if this surgery were performed and if it were successful and the child survived, that this still would not be a normal child. That it would still be a mongoloid, a Down's syndrome child with all the problems that even the best of them have. That they did have another alternative which was to do nothing. In which case the child probably live only a matter of several days and would die of pnuemonia probably. ... Some of these children, as I indicated in my testimony to Judge Baker are mere blobs. Some of them are, most of them eventually learn to walk

> and most of them eventually learn to talk. ...[T]his talk consists of a single word or something of this sort at best. I have never personally known how the true Down's Syndrome child that was able to be gainfully employed in anything other than a sheltered workshop, with constant supervision, in other words, a child that could be self-supporting. I've never heard of such a Down's Syndrome child. I've never heard of a Down's Syndrome child that could live alone. They require at best constant attention. ...These children are quite incapable of telling us what they feel, and what they sense, and so on.

Judge Baker apparently agreed with Dr. Owens. On April 12, 1982, he issued a Declaratory Judgment ordering Bloomington Hospital to allow Mr. and Mrs. Doe to choose a course of "treatment" for Infant Doe that was certain to result in his death. App. 12-13. No guardian ad litem or counsel was appointed to represent Infant Doe at the April 10th hearing and his due process and equal protection

rights guaranteed by the Fourteenth Amendment to the U. S. Constitution were not raised at that juncture. However, in his April 12th order, Judge Baker appointed the Monroe County Department of Public Welfare as guardian ad litem for Infant Doe. When that Department, by its attorney, Betty K. Mintz, reported on April 13, 1982 that it did not wish to appeal the judgment of Judge Baker (R. 11), the trial court appointed Philip C. Hill as guardian ad litem for purposes of appeal. R. 14.

On April 13, 1982, Philip Hill filed a Petition for Temporary Restraining Order. R. 14. In that petition, he requested that Infant Doe be fed intravenously and that immediate steps be taken to transport him to Riley Hospital for emergency corrective surgery. In addi-

tion, Mr. Hill claimed that the Temporary Restraining Order was necessary to protect Infant Doe's federal constitutional rights guaranteed by the Fourteenth Amendment. R. 15-16. Thus, Infant Doe, by his guardian ad litem, Philip Hill, raised the federal questions sought to be reviewed by this Court at his first available opportunity. On April 15, 1983, Mr. Hill was succeeded as guardian ad litem by Lawrence Brodeur. R. 133

An appeal of Judge Baker's April 12, 1982, declaratory judgment was timely filed in the Indiana Court of Appeals. In that appeal, Infant Doe again claimed that his due process and equal protection rights secured by the Fourteenth Amendment to the United States Constitution had been violated. Brief of Appellant at 7-8, 15-23, 37-45.

On February 3, 1983, the Indiana Court of Appeals issued a written order dismissing Infant Doe's appeal as moot. App. 2-6. Infant Doe's Petition for Rehearing that was filed on February 23, 1983, was denied on March 14, 1983 without opinion.

On March 30, 1983, Infant Doe filed a timely Petition to Transfer this case to the Indiana Supreme Court. Again he raised the federal questions which were raised in the trial court and court of appeals--denial of his rights to due process and equal protection under the Fourteenth Amendment. Brief in Support of Petition for Transfer at 24. His Petition to Transfer was denied on June 15, 1983, without opinion. App. 1.

Infant Doe has exhausted his state remedies and has filed this Petition for

Writ of Certiorari so that the important federal questions raised by the Monroe County Circuit Court's Declaratory Judgment and Order of April 12, 1982 (App. 7) may finally be decided.

REASONS FOR GRANTING THIS PETITION

Infant Doe, through his guardian ad litem, has claimed that his federal due process and equal protection rights secured by the Fourteenth Amendment to the Constitution were violated by Judge Baker's Declaratory Judgment and Order of April 12, 1982. Does a newborn handicapped infant have rights of his own or do his parents have a right of privacy that transcends his rights and allows them to determine whether he will live or die? Judge Baker's declaratory judgment clearly favored the parents, allowing them to choose a course of "treatment" for Infant Doe that was certain to result in his death. Both the Indiana Court of Appeals and the Indiana Supreme Court refused to review Judge Baker's order,

claiming that the case became moot upon Infant Doe's death. But Infant Doe's death did not moot the federal questions that were raised, and the Indiana courts have abdicated their responsibility to decide them.

Important federal questions raised by Infant Doe in the Indiana courts have not yet been addressed by this Court. It is urgent that this Court review them: denial of lifesaving medical treatment, food, and water to children because they are handicapped is an increasingly frequent practice. See, Gustafsen, Mongolism, Parental Desires and the Right to Life, in Death, Dying and Euthanasia, 250-278 (Horan and Mall, eds. 1980); Duff and Campbell, Moral and Ethical Dilemmas in the Special Care Nursery, 289 New England Journal of

Medicine 89 (1973)(documenting 43 cases of nontreatment at Yale-New Haven Hospital). The issues continue to be hotly debated in medical and legal circles. See e.g., Thomas, Potential for Personhood: A Measure of Life: The Severely Defective Newborn, Legal Implications of a Social-Medical Dilemma, 2 Bioethics Quarterly 3 (1980); McMillan, Birth-Defective Infants: A Standard for Non-Treatment Decisions, 30 Stan. L. Rev. 599 (1978); Goldstein, Medical Care for the Child at Risk: On State Supervision of Parental Autonomy, 86 Yale L. J. 645 (1976); Horan, Euthanasia, Medical Treatment, and the Mongoloid Child: Death as a Treatment Choice?, 27 Baylor L. Rev. 76 (1975); Robertson, Involuntary Euthanasia of Defective Newborns: A Legal Analysis, 27 Stan. L. Rev. 213

(1975). These commentators have recognized that when, as in this case, state action is involved in treatment denial, important constitutional issues are implicated.

The Indiana appellate courts have either shirked their responsibility to decide the important federal constitutional questions raised by Infant Doe, or they have tacitly approved of Judge Baker's Order. Neither resolution should be allowed to stand without review by this Court. The compelling nature of this controversy and its capacity to recur, yet evade review, argue for consideration of the Infant Doe case by this Court.

I. THE FEDERAL CONSTITUTIONAL QUESTIONS RAISED BY INFANT DOE ARE NOT MOOT UNDER FEDERAL LAW

Infant Doe, through his guardian ad litem, has claimed that his federal due process and equal protection rights secured by the Fourteenth Amendment to the Constitution were violated by Judge Baker's Declaratory Judgment and Order of April 12, 1982. Both the Indiana Court of Appeals and the Indiana Supreme Court refused to review Judge Baker's order, claiming that the case became moot upon Infant Doe's death. In dismissing his appeal and petition for transfer, these courts also dismissed the federal questions raised by Infant Doe.

The Indiana courts should have reached the federal questions raised by

Infant Doe unless those questions were moot under federal law. If, in declining to review the federal questions, the Indiana courts decided that they were moot under federal law, then the Indiana courts erroneously interpreted federal mootness doctrine. If, on the other hand, the Indiana courts failed to reach the federal questions simply because they felt that Indiana mootness doctrine precluded them from asserting jurisdiction, this Court is not thereby prevented from exercising its jurisdiction.

A. This Case Falls Within the "Capable of Repetition Yet Evading Review" Exception to the Mootness Doctrine

Federal mootness doctrine arises out of the "case" or "controversy" requirement of Article III of the U.S. Constitution. It is true that, in general, a case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome" of the litigation. Powell v. McCormack, 395 U.S. 486, 496 (1969). But Article III justiciability is "not a legal concept with a fixed content or susceptible of scientific verification." Poe v. Ullman, 367 U.S. 497, 508 (1961). "[T]he justiciability doctrine [is] one of uncertain and shifting contours." Flast v. Cohen, 392

U.S. 83, 97 (1968).

Because of the flexibility inherent in Article III justiciability, exceptions to the mootness doctrine have arisen--one notable exception allows an otherwise moot case to be heard because the issues it raises are "capable of repetition yet evading review." Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 489, 515 (1911). Without such an exception, a party might be adversely affected by governmental action, yet be left "without a chance of redress." Id. See also, Super Tire Engineering Co. v. McCorkle, 416 U.S. 122 (1974).

The mootness issue in this case is analogous to that presented in Roe v. Wade, 410 U.S. 113 (1973). Although Jane Roe's pregnancy had already been terminated, this Court observed:

> [W]hen, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid.

Roe, 410 U.S. at 125.

Just as pregnancy was a "significant fact" of the litigation in Roe, Infant Doe's death by starvation and dehydration is a "significant fact" of this litigation. A newborn child denied food and water will shortly die--Infant Doe survived only six days. Thus, if the infant's death makes a case such as this moot, litigation of this kind never will "survive beyond the trial stage and appellate review will be effectively denied." Important federal questions

raised on behalf of such infants will never be reviewed; each infant asserting violations of his constitutional rights by the trial court would die before his case could be heard on appeal.

This Court has recently narrowed the breadth of the "capable of repetition, yet evading review" exception to mootness, stating that it is "limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Weinstein v. Bradford, 423 U.S. 147, 149 (1975); see also, Murphy v. Hunt, 102 S.Ct. 1181, 1183 (1982).

Cases involving nontreatment of hand-

icapped newborns certainly meet the first requirement, but cannot possibly meet the second. Since the complaining party is dead, the same controversy will never occur to the same complaining party again.

In other types of actions class certification may be easily obtained to prevent mootness. But here, although instances of nontreatment occur with some frequency, as the legal and medical literature earlier cited attests, they are not known to occur in great numbers simultaneously. Thus, it is unlikely that the numerosity requirement for class certification of Fed. R. Civ. P. 23(a)(1) can be met in these cases.

Presumably, this limitation on the "capable of repetition, yet evading review" doctrine was not intended to be

rigidly applied to cases such as Infant Doe's. Suppose, for example, that the courts of some state had a practice of executing convicted murderers before they could appeal claims of federal due process violations that occurred during trial. Should counsel for one of those executed seek review of that practice, surely this Court would not declare that case to be moot even though the "same party" could never again be deprived of his due process rights because he was dead.

Yet this hypothetical is analogous to the situation of Infant Doe. Because of Judge Baker's order, Infant Doe died before he could exhaust state remedies and reach this Court. Indeed, counsel for Infant Doe were en route to Washington for a hearing before Justice Stevens

when they were informed that the child had died.

If a state court's denial of life-saving medical treatment, food, and water to a handicapped newborn is ever to be tested against the constitutional guarantees of due process and equal protection of law, then this Court must not blindly apply the limitations of Weinstein to these cases. This Court should refuse to dismiss this case as moot, just as it did in Roe when presented with federal questions of equal magnitude. Otherwise, state courts could violate the federal constitutional rights of handicapped newborns with impunity. "Our law should not be so rigid." Roe, 410 U.S. at 125. See also, Sosna v. Iowa, 419 U.S. 393, 400-401 (1974).

B. The Underlying Reasons for the "Case or Controversy" Requirement of Article III Are Satisfied

The Article III requirement of a "case or controversy" is designed to ensure that the federal courts decide cases where a true adversary relationship exists, rather than render advisory opinions in controversies where the applicable constitutional questions are ill-defined and speculative. United States Parole Com'n v. Geraghty, 445 U.S. 388 (1980); United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947). Where an adversary relationship is present and the federal courts can fashion a judicial remedy, the Article III requirements are satisfied.

"The imperatives of a dispute capable

of resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." Geraghty, 445 U.S. at 403, citing Franks v. Bowman Transportation Co., 424 U.S. 747, 753-756 (1976).

This case presents a concrete factual setting with sharply defined issues and a true adversary relation between the parties continues to exist. Mr. and Mrs. Doe staunchly continue to claim that Judge Baker's order granting them the right to choose death for Infant Doe was correct. (This is in spite of the fact that at least one couple who already had a Down's syndrome child sought to adopt Infant Doe so that he might be given the necessary surgery and allowed to live. R. 178.) Infant Doe, through his guar-

dian, still vigorously claims that that Order should be reversed and that his right to life and equal protection of law have been violated solely because he was handicapped.

Moreover, should this Court fail to decide these questions, other handicapped infants like Infant Doe, whose rights have been violated, will meet the same fate as Infant Doe and their constitutional rights also will be denied review. There would never be an opportunity for these handicapped infants to have their rights vindicated--an important policy consideration that favors review by this Court.

II. THE FAILURE OF THE MONROE COUNTY CIRCUIT COURT TO APPOINT A GUARDIAN AD LITEM OR COUNSEL FOR INFANT DOE DENIED HIM PROCEDURAL DUE PROCESS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In Shelley v. Kraemer, 334 U.S. 1, 16-17 (1947), this Court noted, "[T]he action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment." The Monroe County Circuit Court's Order effectively denying Infant Doe lifesaving surgery, food, and water without appoint-

ing counsel or a guardian ad litem for him thus constituted state action for the purposes of procedural due process analysis.

At the April 10, 1982, hearing on the matter of the treatment and care of Infant Doe--the hearing that resulted in the Declaratory Judgment and Order that effectively denied Infant Doe treatment--no guardian ad litem or counsel for the child was present. After having heard the evidence that was presented at the hearing, Judge Baker declared, "All qualified persons available to present evidence in this matter were present and thus appointment of a guardian ad litem for Infant Doe was not required to proceed further in this hearing." App. 12.

Only after he issued his Declaratory Judgment did Judge Baker appoint the

Monroe County Department of Public Welfare "as guardian ad litem for the Infant Doe to determine whether the judgment of this Court should be appealed." App. 13.

Implicit in Judge Baker's assertion that appointment of a guardian ad litem to represent Infant Doe at the hearing on the matter of his treatment and care was "not required" is the patently erroneous assumption that the child's interests were adequately represented by someone at that hearing.

Doctors Schaffer, Wenzler, and Laughlin appeared at the hearing to advocate the opinion that the proper course of medical treatment for Infant Doe was to transfer him to another hospital where Infant Doe's tracheoesophageal fisutla could be corrected. App. 9-10. But none

of these physicians was a guardian ad litem for Infant Doe; none was his attorney.

Infant Doe's father and his father's attorney were also present, but Mr. Doe testified at the hearing that he and his wife had "determined that it is in the best interest of the Infant Doe and the two children who are at home and their family entity as a whole" that the child should be left to die. App. 10 (emphasis added). Thus, it is clear that Mr. Doe did not represent Infant Doe's interests alone. He also represented the interests of his wife, his two other children, and "the family entity as a whole"--interests adverse to Infant Doe's.

In Parham v. J.R., 442 U.S. 584, 600 (1979), this Court observed that, "[n]ormally . . . since . . . (a child's)

interest is inextricably linked with the parents' interest in an obligation for the welfare and health of the child, the private interest at stake is a combination of the child's and parents' concerns." But, "[a]s with many other legal presumptions," this Court noted, "experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this." Id. "That some parents may at times be acting against the interests of their children . . . creates a basis for caution. . . " Id.

In this case, it is plain that the rearing of a child with Down's syndrome may mean a number of economic and social hardships for a family unit. Such considerations were admittedly part of Mr. Doe's decision-making process. Since

there was conflict between the best interests of Infant Doe and those of his parents and family, it follows that his father could not adequately represent the "best interests" of Infant Doe at the hearing.

In Parham, this Court stated that "[w]hat process is due constitutionally cannot be divorced from the nature of the ultimate decision that is being made." 442 U.S. at 608. The extent to which procedural due process must be afforded to an individual is governed by the extent to which he may be "condemned to suffer grievous loss," Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the individual's interest in avoiding that loss outweighs the government's interest

in summary adjudication. Goldberg v. Kelly, 397 U.S. 254, 262-263 (1970). Further, "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved, as well as of the private interest that has been affected by governmental action." Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

These standards raise the serious and important question of whether due process is denied by failure to provide a handicapped child, such as Infant Doe, with adequate representation through counsel or a guardian when decisions that affect whether he will live or die are under consideration.

III. THE MONROE COUNTY CIRCUIT COURT'S ORDER DEPRIVED INFANT DOE OF HIS SUBSTANTIVE DUE PROCESS RIGHT TO LIFE IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Order of the circuit court stated, "[T]he Court now directs the Bloomington Hospital to allow treatment prescribed by Dr. Walter L. Owens, as directed by the natural parents, Mr. and Mrs. Doe, for the Infant Doe." App. 12-13. This "treatment" required "that the child remain at Bloomington Hospital with full knowledge that surgery to correct tracheoesophageal fistula was not possible at Bloomington Hospital and that within a short period of time the child would succumb due to inability to receive

nutriment and/or pneumonia." App. 9. Since the Order forbade Bloomington Hospital to transfer Infant Doe for the surgery necessary to save his life, it effectively mandated Infant Doe's death.

This Order constituted "state action" for the purpose of the due process and equal protection clauses of the Fourteenth Amendment. Indeed, the circuit court specifically stated that it was appearing in this case "solely as a representative of the State of Indiana." App. 12.

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part, "[N]or shall any State deprive any person of life . . . without due process of law. . . ." In Roe v. Wade, 410 U.S. at 156-57, this Court, while holding that a fetus is not

a "person" for the purposes of the Fourteenth Amendment, noted that if it were established that a fetus was a person, "the fetus' right to life would then be guaranteed specifically by the Amendment." While the term "person" does not include a fetus, "the use of the word is such that it has application . . . postnatally." Id. at 157. Since Infant Doe was, of course, born, he was a person under the Fourteenth Amendment and entitled to the right to life. "Like any infant, the deformed child is a person with a right to life--a right that is the basis of our social order and legal system." Robertson, Involuntary Euthanasia of Defective Newborns: A Legal Analysis, 27 Stan. L. Rev. at 216.

"Where certain 'fundamental rights' are involved, the Court has held that

regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Roe, 410 U.S. at 155 (citations omitted). The two interests apparently suggested to justify state deprival of Infant Doe's life--protection of parental autonomy and prevention of a "minimal quality of life"--are plainly not sufficient to meet the compelling state interest standard. But even assuming that the State had a legitimate and compelling social and financial interest at stake in "eradicating" handicaps because of the possible burdens individuals with handicaps impose on family members and society as a whole, the "means" chosen to accomplish this goal are obviously not

"narrowly drawn." The State's interest in reducing the incidence of handicaps and in protecting parental autonomy may be strong, but it may not constitutionally be fostered by eliminating those with handicaps. No one would argue that, to advance an interest in reducing the incidence of sickle-cell anemia, the State might constitutionally execute blacks who suffer from the disease, or that to advance an interest in reducing poverty, the State might constitutionally execute poor people. Nor could one argue that, to advance an interest in parental autonomy, the State could constitutionally relieve parents who cause the death of their children from the strictures of the homicide code.

Thus, a very substantial and important federal question is raised: whether

the order of a court that deprives a handicapped child of lifesaving medical treatment, food, and water violates that child's substantive right to life under the Fourteenth Amendment to the Constitution. That question ought to be settled by this Court.

IV. THE CIRCUIT COURT'S ORDER DEPRIVED INFANT DOE OF EQUAL PROTECTION OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Although Indiana law clearly requires that life and health preserving medical care be afforded to infants situated as was Infant Doe, the Circuit court necessarily construed that law as inapplicable to those who, like Infant Doe, are regarded as lacking "a minimally acceptable

quality of life" because of their handicap. App. 10.

Ind. Code §35-1-58.5-7(b) (1976) provides:

> Any fetus born alive shall be treated thereafter as a person under the law. . . . ; failure to take all reasonable steps, in keeping with good medical practice, to preserve the life and health of said live born person shall subject the responsible persons to the Indiana laws governing homicide, manslaughter and civil liability for wrongful death and medical malpractice.

The relevant Indiana homicide laws, set forth in the Appendix (App. 19-20), thus protect all those who, like Infant Doe, require life-sustaining medical treatment after birth. They were, however, impliedly construed as inapplicable to those with handicaps like Infant Doe.

A strong argument can be made that, insofar as these statutes as applied

discriminate against the handicapped, they invoke "strict scrutiny" by disadvantaging a "suspect class."

The criteria necessary to create the existence of a "suspect class" were first indicated by Chief Justice Stone in United States v. Carolene Products, 304 U.S. 144, 152-153 n.4 (1938):

> [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

More recently, in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), this Court summarized the "traditional indicia of suspectness," holding that a legislative classification based on a group characteristic would

trigger strict judicial scrutiny when that group has been

> saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Id. at 4.

As a "discreet and insular" minority, it is certain that handicapped individuals possess all or most of these "indicia." See generally, Burgdorf & Burgdorf, A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause, 15 Santa Clara Law 855 (1975). See, esp., id. at 905-908. Whether they qualify as a suspect class for equal protection purposes is an important question of federal

law that has not been, but should be, settled by this Court.

But may exclusion from the protection of these statutes be justified by a "compelling state interest" that supports discrimination against the handicapped so extreme that it deprives them of their lives? Even under the "relaxed" judicial scrutiny appropriate were the handicapped not a "suspect class," would such discrimination be justified by any "legitimate" state interest? See this Petition at 40-41. These are questions so frequently raised, both in the literature (see, e.g., Thomas, supra p. 16) and in concrete cases like that of Infant Doe, that they deserve to be resolved decisively by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Indiana.

Respectfully submitted,

LAWRENCE J. BRODEUR
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APPENDIX

STATE OF INDIANA [seal]

Indianapolis 46204
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Clerk of the Supreme Court
and Court of Appeals

Marjorie H. O'Laughlin, Clerk
217 State House

No. 1-782A157
In re: The Guardianship of Infant
Doe v. John and Mary Doe, et al.

You are hereby notified that the Supreme Court has on this day denied "Verified Motion for Release of Appellate Records for In Camera Use in Federal District Court." Givan, C.J. All justices concur in denial, except DeBruler, J., would grant the motion except for pleadings and orders revealing the identity of Baby Doe and parents. "Motion for Release of Appellate Records" is hereby denied. Givan, C.J. All justices concur in denial, except DeBruler, J., would grant the motion except for pleadings and orders revealing the identity of Baby Doe and parents. Appellant's "Petition for Transfer" is hereby denied. Givan, C.J. All justices concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 15th day of June, 1983.

Marjorie O'Laughlin
Clerk Supreme Court and Court of Appeals

IN THE
COURT OF APPEALS OF INDIANA

No. 1-782 A 157

IN RE: THE GUARDIANSHIP OF INFANT DOE	APPEAL FROM
INFANT DOE, Appellant (Respondent Below),	THE MONROE CIRCUIT COURT
JOHN and MARY DOE, PARENTS OF INFANT DOE Appellee (Petitioners) Below),	THE HONORABLE JOHN G. BAKER, JUDGE PRO-TEMPORE
BLOOMINGTON HOSPITAL Appellee (Petitioner Below),	THE HONORABLE
MONROE COUNTY WELFARE DEPARTMENT Appellee (Petitioner Below).	C. THOMAS SPENCER JUDGE PRO-TEMPORE

ORDER DISMISSING APPEAL

This cause having been submitted to the Court of Appeals of Indiana, First District, on the Motion to Dismiss Appeal and Amended Motion to Dismiss Appeal filed by Appellees John Doe and Mary Doe, parents of Infant Doe, and the court having considered said motions and Appellant's Memorandum in Opposition to said motions, and heard oral arguments thereon, now finds as follows:

1. On April 14, 1982, a petition for writ of mandamus was filed in the Supreme

Court of Indiana, under cause number 482 S 139, entitled State of Indiana on the Relation of Barry S. Brown, Prosecuting Attorney, 10th Judicial Circuit, Monroe County, Relator, vs. The Monroe Circuit Court and The Honorable C. Thomas Spencer, Judge pro tempore, as Judge Thereof, Respondent. In said petition it was alleged that Infant Doe's parents were refusing to provide either nourishment or medical care necessary to sustain the life of Infant Doe, and that the Monroe Circuit Court had refused to order Infant Doe taken into custody or to issue an injunction ordering that medical care be provided to said Infant Doe. The petition requested the Indiana Supreme Court to issue a writ of mandamus ordering the Monroe Circuit Court to act to take said child into custody and to issue an injunction to provide medical care necessary to sustain said child's life.

2. That on April 14, 1982, a petition for writ of mandamus and writ of prohibition was filed in the Supreme Court of Indiana under cause number 482 S 140 entitled State of Indiana on the Relation of Infant Doe, by Guardian ad litem Philip C. Hill, Realtor, vs. The Monroe Circuit Court and The Honorable John G. Baker, as Judge Thereof, Respondents. In that petition it was alleged that an emergency hearing was held on Saturday, April 10, 1982, at the Bloomington Hospital wherein Judge John G. Baker ordered that said hospital allow treatment prescribed by a Dr. Owens and as directed by the natural parents of Infant Doe and that said infant was not

represented by counsel but was only represented indirectly by the parents whose interests either were adverse or not identical to Infant Doe's. The petition further alleged that the trial court had exceeded its jurisdiction and that it failed to act when it had a duty to act to preserve the life of Infant Doe. The petition further alleged that unless immediate action was taken by the court, the child whould die. This petition requested that the Indiana Supreme Court issue a writ of mandamus ordering the Monroe Circuit Court to provide certain medical treatment in order that Infant Doe be kept alive.

3. On April 14, 1982, the Supreme Court of Indiana heard both petitions and declined to issue a writ of mandamus in either cause number 482 S 139 or cause 482 S 140.

4. On May 27, 1982, the Supreme Court of Indiana issued its order dismissing both cases, the same being causes number 482 S 139 and 482 S 140. Omitting caption and signature, the dismissal order so entered by the Supreme Court of Indiana reads as follows:

> "On April 14, 1982, the above-mentioned causes were presented, and arguments were heard, on Relators' Emergency Petitions for Writs of Mandamus. At that time this Court declined to issue a writ of mandamus in either case.
>
> Respondents, by counsel, Andrew C. Mallor and Nancy C.

> Broyles, have filed a 'Verified Motion to Dismiss Petition for Writ of Mandamus' in each of the above-captioned causes for the reason that the child denominated 'Infant Doe' has died. Having examined the two 'Verified Motions to Dismiss Petitions for Writs of Mandamus' and the certified death certificate, this Court finds the cases under Cause No. 482 S 139, and Cause No. 482 S 140 are moot. Accordingly, each case is hereby DISMISSED.
>
> The Clerk is directed to refund the filing fee in Cause No. 482 S 140, and is further directed to transmit a copy of this Order to counsel of Record.
>
> DONE AT INDIANAPOLIS, INDIANA this 27 day of May, 1982."

5. That all of the issues attempted to be asserted in this appeal either were presented to, or could have been presented to the Supreme Court of Indiana in causes number 482 S 139 and 482 S 140.

6. The Indiana Supreme Court found all of said questions to be moot by reason of the death of Infant Doe and dismissed both of said cases, causes number 482 S 139 and 482 S 140, by its order of May 27, 1982, hereinbefore set out.

7. That the determination and decision of the Supreme Court of Indiana in

said causes number 482 S 139 and 482 S 140 that said causes were moot and ordering them dismissed is binding upon this court and determinative of the issues raised in the Appellee's Motions to dismiss this appeal. For those reasons, Appellee's motions to dismiss should be granted and this appeal should be dismissed.

Therefore, it is ordered by this court that Appellee's motion to dismiss this appeal is hereby granted and this appeal is now dismissed at Appellant's costs.

Done at Indianapolis, Indiana, this 3rd day of February, 1983.

COURT OF APPEALS OF INDIANA

BY: (s)
Paul H. Buchanan, Jr.,
Chief Judge

(s)
Jonathan J. Robertson, Presiding Judge

(s)
Robert W. Neal, Judge

(s)
Wesley W. Ratliff, Jr., Judge

IN THE CIRCUIT COURT FOR
THE COUNTY OF MONROE

STATE OF INDIANA

IN THE MATTER OF THE
TREATMENT AND CARE
OF INFANT DOE CAUSE NO. GU 8204-004A

DECLARATORY JUDGMENT

This matter came to be heard by the Court under certain extraordinary conditions concerning the emergency care and treatment of a minor child born at the Bloomington Hospital.

The Court was contacted at his residence by representatives of the Bloomington Hospital. On the basis of representations made by those representatives, the Court quickly determined that an extreme emergency existed.

The Court further determined that the Judge of the Monroe Circuit Court had been contacted concerning this matter and was unable to attend the emergency hearing, and the Court personally contacted the Judge of the Monroe Circuit Court who directed this Court to proceed with hearing. Thereafer, hearing was held on the Sixth Floor of the Bloomington Hospital at approximately 10:30 p.m., Saturday, the 10th day of April, 1982.

The following persons were present: John Doe, natural father of Infant Doe, with counsel, Andrew C. Mallor, Esquire; Maggie Keller, Gene Perry, Admisistrative

Vice-Presidents of Bloomington Hopistal; Len E. Bunger, counsel for Bloomington Hospital; Dr. Walter L. Owens, Dr. William R. Anderson, Dr. Brandt L. Ludlow, obstetricians admitted to practice in the State of Indiana with privileges at Bloomington Hospital; Doctor Owens being the obstetrician in attendance at delivery at Infant Doe; Dr. Paul J. Wenzler, family practitioner with pediatric privilege at Bloomington Hospital and who has attended to Mr. and Mrs. Doe's other two children after their birth; Dr. James J. Schaffer and Dr. James J. Laughlin, pediatricians holding pediatric privileges at Bloomington Hospital. (Mrs. Doe was physically unable to attend.)

The Court thereafter heard evidence. Doctor Owens spoke for and on behalf of the obstetric group that delivered the Infant Doe, advising the Court that at approximately 8:19 p.m. on the evening of April 9, Infant Doe was born to Mary Doe in an uneventful delivery, but that shortly thereafter it was very apparent that the child suffered from Down's Syndrome, with the futher complication of trachioesophageal fistula, meaning the passage from the mouth to the stomach had not appropriately developed and, in fact, were the child to be fed orally, substances would be taken into the lungs and the child most likely would suffocate.

Doctor Owens further stated that he had been previously advised that Doctor Wenzler would serve as practitioner for Infant Doe and that he was further advised that Doctor Wenzler, when faced

with extraordinary cases, routinely consulted with Docter Schaffer. Doctor Schaffer was at the Bloomington Hospital at that time and was called by Doctor Owens and was requested to examine the baby. Doctor Wenzler was notified. Doctors Owens, Schaffer and Wenzler consulted; Doctors Wenzler and Schaffer indicated that the proper treatment for Infant Doe was his immediate transfer to Riley Hospital for corrective surgery. Doctor Owens, representing the concurring opinions of himself, Drs. Anderson and Ludlow, recommended that the child remain at Bloomington Hospital with full knowledge that surgery to correct trachioesophageal fistula was not possible at Bloomington Hospital and that within a short period of time the child would succomb due to inability to receive nutriment and/or pneumonia.

His recommended course of treatment consisted of basic techniques administered to aid in keeping the child comfortable and free of pain. Doctor Owens testified that, even if surgery were successful, the possibility of a minimally adequate quality of life was non-existent due to the child's severe and irreversible mental retardation.

Doctor Schaffer testified that Doctor Owens' prognosis regarding the child's mental retardation was correct, but that he believed the only acceptable course of medical treatment was transfer to Riley Hospital in Indianapolis for repair of trachioesophageal fistula.

Doctor Wenzler concurred in Doctor Schaffer's proposed treatment. Doctor

Laughlin testified that he concurred in the opinions of Doctors Schaffer and Wenzler, and he differed with Doctor Owens' opinion in that he knew of at least three instances in his practice where a child suffering from Down's Syndrome had a reasonable quality of life. However, he related no knowledge of treatment of children with co-existent maladies of Down's Syndrome and trachioesophageal fistula.

Doctor Owens testified that he presented Mr. and Mrs. Doe with the two recommended courses of treatment and requested that they come to a decision. Doctor Owens understood that Doctors Schaffer and Wenzler also discussed their recommendations with Mr. and Mrs. Doe.

Mr. Doe testified that he had been a licensed public school teacher for over seven years and had on occasion worked closely with handicapped children and children with Down's Syndrome and that he and his wife felt that a minimally acceptable quality of life was never present for a child suffering from such a condition. Mr. Doe was lucid and was able to make an intelligent, informed decision.

Mr. Doe further testified that, after consulting with Doctor Owens, Schaffer, Wenzler and Laughlin, he and his wife have determined that it is in the best interest of the Infant Doe and the two children who are at home and their family entity as a whole, that the course of treatment prescribed by Doctor Owens should be followed, and at approximately

2:45 p.m., he and his wife, in the presence of each other and witnesses, signed a statement directing Doctor Owens to proceed with treatment of the infant, the content of said statement, omitting names and dates, is as follows:

> "The undersigned being the parents of Infant _____, born _____, at Bloomington Hospital, have had explained to them and they acknowledge that they understand, the course of this treatment for Infant _____ as indicated appropriate for Infant _____ by Doctors Walter L. Owens, James J. Laughlin, James J. Schaffer and Paul J. Wenzler.
>
> Acknowledging their understanding and the consequences of all of the above proposals made by all of the above four physicians, that they direct that the course of treatment shall proceed as directed by Dr. Walter Owens, M.D., who does not have privilege to practice pediatrics at Bloomington Hospital."

Mr. Len E. Bunger, on behalf of Bloomington Hospital made a statement that it was the hospital's primary function to reduce morbidity and mortality and that the hospital did not have the knowledge or the authority to make diagnoses or to prescribe treatment and, for that reason, had requested the Court to make a ruling in this matter.

The Court, having heard evidence, recesses and thereafer determines as follows:

1. All qualified persons available to present evidence in this matter were present and thus appointment of a guardian ad litem for Infant Doe was not required to proceed further in this hearing.

2. The Court appeared solely as a representative of the State of Indiana and the laws of the State of Indiana require that the parents be sufficiently informed, as they are in this instance, and any personal feelings of the Court should not intervene.

ISSUE

Do Mr. and Mrs. Doe, as the natural parents of Infant Doe have the right, after being fully informed of the consequences, to determine the appropriate course of treatment for their minor child?

CONCLUSION

It is the opinion of this Court that Mr. and Mrs. Doe, after having been fully informed of the opinions of two sets of physicians, have the right to choose a medically recommended course of treatment for their child in the present circumstances.

ORDER

The Court, being sufficiently advised, now directs the Bloomington

Hospital to allow treatment prescribed by Dr. Walter L. Owens, as directed by the natural parents, Mr. and Mrs. Doe, for the Infant Doe.

The Court futher directs that the Clerk of this Court assign a cause number and enter this cause upon the guardianship docket and fee book of this Court.

The Court futher appoints the Monroe County Department of Public Welfare as guardian ad litem for the Infant Doe to determine whether the judgment of this Court should be appealed.

DATED this 12th day of April, 1982.

(s)
JOHN G. BAKER
Judge, Monroe Superior Court
Division III, and as

Special Judge, Moroe Circuit Court

cc: Len E. Bunger

Andrew C. Mallor

Betty K. Mintz, Counsel
Monroe County department
of Public Welfare

STATE OF INDIANA)
) SS:
COUNTY OF MONROE)

IN THE MONROE
CIRCUIT COURT
JUVENILE DIVISION

IN RE: THE MATTER OF)
BABY DOE, A CHILD IN)
NEED OF SERVICES UNDER)
THE AGE OF EIGHTEEN)

CAUSE NUMBER:
JV8204-038A

TRANSCRIPT OF HEARING HELD ON
PETITION FOR EMERGENCY DETENTION
HELD ON APRIL 13, 1982

THE HONORABLE
C. THOMAS SPENCER, JUDGE PRO-TEMPORE

APPEARANCES:

Barry S. Brown, Prosecuting Attorney
Lawrence J. Brodeur, Deputy Prosecuting Attorney
Court House
Bloomington, Indiana
ATTORNEYS FOR PETITIONER AND STATE OF INDIANA

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ATTORNEY FOR NATURAL PARENTS MR. & MRS. DOE

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ATTORNEY FOR MONROE COUNTY DEPARTMENT OF PUBLIC WELFARE

Philip C. Hill
BUNDER, HARRELL & ROBERTSON
226 South College Square

Bloomington, Indiana 47401
ATTORNEY FOR DR. JAMES LAUGHLIN,
INTERESTED PARTY AND WITNESS

BE IT FURTHER REMEMBERED, that on the 14th day of April, 1982, The Court having taken this matter under advisement and being duly advised now makes the following findings;

1. That Baby Doe is a four-day old child with Down's Syndrome and a further complication of trachioesophageal fistula, meaning the esophagus is not properly connected to the stomach.

2. That without corrective surgery the child will die due to its inability to receive nourishment.

3. That this Court has previously determined that the parents have the right to choose a medically recommended course of treatment for their child at this time.

4. That two alternative treatment plans have been presented to the parents. The first is corrective surgery at Riley Hospital. The second would be to take no action knowing that the child will die as a result thereof.

5. That this Court previously determined that these are medically recommended treatment modes and no evidence was presented concerning this issue.

6. That the parents, after consultation with all physicians concerned, chose the second treatment mode of allowing the child to succumb.

7. That this decision was made knowingly, voluntarily, and with the advice of medical experts.

8. That the parents in accordance with their religious beliefs have had the child baptized and seen that it has received the last rites.

9. That the child has, at the expense of the parents, been placed in a private room at the Bloomington Hospital under the supervision of private duty nurses hired by the parents where it is receiving no nourishment and under doctors orders will receive pain medication if they appear necessary.

10. That this Court has previously conducted a hearing concerning this matter and entered a declaratory judgment, a copy of which is attached to this order.

11. That the Monroe County Child Protection Team of the Monroe County Department of Public Welfare, which was previously appointed Guardian ad Litem for the Baby Doe, conducted a hearing concerning this matter and decided not to appeal this Court's previous decision.

12. That the State of Indiana has filed a Petition for Emergency Detention pursuant to I.C. 31-6-4-4 requesting that the Monroe County Department of Public Welfare take immediate custody of the Baby Doe and provide emergency treatment to said child.

13. That in order for the Court to issue such an order it must be shown that the

child is a child in need of services as defined in I.C. 31-6-4-3.

14. That after considering the evidence the Court finds that the State has failed to show that this child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of his parents to supply the child with necessary food, and medical care.

WHEREFORE, The Court now DENIES the State's Petition for Emergency Detention.

So ordered this 14th day of April, 1982.

C. Thomas Spencer, Judge Pro-Tempore

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, §2, cl. 1:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. amend. XIV, §1:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

Ind. Code Ann. §35-1-58.5-7(b) (Burns 1979 Repl.):

> (b) Any fetus born alive shall be treated thereafter as a person under the law and a birth certificate shall be issued certifying the birth of said person even though said person may thereafter die, in which event a death certificate shall issue pursuant to law; failure to take all reasonable steps, in keeping with good medical practice, to preserve the life and health of said live born person shall subject the responsible person to Indiana laws governing homicide, manslaughter and civil liability for wrongful death and medical malpractice.

Ind. Code Ann. §35-42-1-1 (Burns 1979 Repl.):

> A person who:
>
> (1) knowingly or intentionally kills another human being . . . commits murder, a felony.

Ind. Code Ann. §35-42-1-4 (Burns 1979 Repl.):

> A person who kills another human being while committing or attempting

to commit:
(1) A class C or class D felony that inherently poses a risk of serious bodily injury. . . commits involuntary manslaughter, a Class C felony.

Ind. Code Ann. §35-42-1-5 (Burns 1982 Supp.):

A person who recklessly kills another human being commits reckless homicide, a class C felony.

Ind. Code Ann. §35-46-1-4 (Burns 1982 Supp.):

(a) A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally:
(1) Places the dependent in a situation that may endanger his life or health; . . . commits neglect of dependent, a Class D felony.